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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-528

AARON E. HENRY, ET AL., *Appellants,*

v.

STATE OF MISSISSIPPI,

and

No. 79-504

UNITED STATES OF AMERICA and BENJAMIN R. CIVILETTI, Attorney General of the United States, *Appellants,*

v.

STATE OF MISSISSIPPI

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) and (d) of the Rules of the Supreme Court of the United States, Appellee moves the final judgment and decree of the United States District Court for the District of Columbia be affirmed on the ground that the questions on appeal are so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the District Court for the District of Columbia in this cause is unpublished and is reprinted in the appendices of the Jurisdictional Statements previously filed by Appellant-Defendants and Appellant-Intervenors below.[1]

JURISDICTION

Pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c) and 28 U.S.C. 2284, and following the filing of the appropriate notices of appeal and Jurisdictional Statements before this Court by the adverse parties below, Appellee respectfully submits this Motion to Affirm.

INTRODUCTION

This case was brought before and tried by a three-judge District Court for the District of Columbia (hereinafter "the Section 5 Court") pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c). The case was tried on an expedited basis at the request of Mississippi. The trial testimony consisted of more than 1500 pages and was accompanied by exhibits numbering in excess of one hundred and fifty (150). The case was extensively briefed and fully argued.[2] The voluminous record and briefs were carefully considered by the court below. On June 1, 1979,

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[1] Since Appellee is addressing the arguments contained in two jurisdictional statements, one filed by Defendants below and the other filed by Defendant-Intervenors below, they are hereinafter referred to as "the Government" and "Intervenors," respectively, and as "the Appellants," collectively.

[2] Findings of Fact and Conclusions of Law, p. 1.

Circuit Judge Malcolm Wilkey and District Judges June Green and Harold Pratt issued their unanimous decision that the Mississippi legislative reapportionment [3] "do[es] not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." [4] From this decision, the Defendants and Defendant-Intervenors [5] have appealed.

Appellants contend that the judgment is in error in three principal respects, i.e., the Section 5 Court erred (a) in impermissibly shifting the burden of proof with respect to the issue of "purpose"; and (b) when it found certain differences between the statutory plan and the *Connor* settlement plan to be insignificant when comparing them to determine the "effect" of the statutory plan on racial minorities. These assertions of error provide the vehicle for advancing Appellants' basic concern, i.e., that the Section 5 Court granted pre-clearance to a reapportionment plan (referred to hereinafter as "the statutory plan") for Mississippi's 174-district legislature (52 Senate districts, 122 House districts) which the Intervenors below contend is not as desirable politically for blacks in certain limited and specific areas of the State as that achieved in litigation by the Appellants before the three-judge court in *Connor* v. *Finch,* 469 F. Supp. 693 (S.D. Miss. 1969).

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[3] Miss. Laws, 1978, Chs., 515 and 535, H.B. 1491 (the House Plan) and S.B. 3098 (the Senate plan).

[4] Order, p. 1.

[5] The Defendant-Intervenors are "ten black citizens and registered voters of the State of Mississippi," all of whom are hereinafter referred to at times collectively with the Defendants as the "Appellants." Findings of Fact 27.

We respond to Appellants' assignments of error by demonstrating that (a) the record amply supports the pertinent findings of fact made by the Section 5 Court; (b) Mississippi was required to carry and did carry its own burden of proof on the absence of any discriminatory "purpose"; and (c) when the State's plan is compared statistically with the *Connor* settlement plan, there is no discernable retrogression in the position of racial minorities and, indeed, when compared with the federal court plan under which the present legislature was elected, a substantial enhancement of the position of racial minorities is realized.

As is demonstrated *infra,* this case turns primarily on the facts as found by the court below. This brief in support of the State's Motion to Dismiss is lengthy because it contains a detailed statement of the case and recitation of relevant facts which are necessary to demonstrate that the detailed factual findings below clearly support the judgment. The trial evidence was fully and carefully considered by the trial court under its prerogatives and responsibilities as the trier of fact. The findings of fact of three judges were unanimous in support of Appellee's position. When the facts are placed in proper perspective, as we endeavor to do herein, it is clear that there are no substantial legal issues for this Court to consider. In the absence of a showing by Appellants that the findings of fact below are "clearly erroneous," there simply is no reason for this Court to undertake full briefing and review of the lower court's decision. Indeed, we believe that when the background and relevant facts are considered, this Court will see that the "equities" are so strongly in Mississippi's favor that the judgment below should be summarily affirmed.

STATEMENT OF THE CASE AND COUNTERSTATEMENT OF FACTS

On May 31, 1977, this Court held that a 1976 court-ordered plan was unconstitutional on malapportionment grounds and returned the matter to the district court with instructions to draft a new plan for the 1979 elections. *Connor* v. *Finch,* 431 U.S. 407 (1977). Although this Court announced its decision reversing the 1976 plan in May, 1977, the Court's mandate was not received by the district court (hereinafter "*Connor* Court") until July 28, 1977. The *Connor* Court promptly responded to the mandate. On August 2, 1977, it issued an order which required the parties and invited the legislature to file proposed reapportionment plans within 90 days. *Connor* v. *Finch,* 422 F.Supp. 1014 (S.D. Miss. 1977). During the subsequent 90-day period, there ensued a flurry of activity by the executive and legislative departments of the State government. On August 9, 1977, the Governor issued a proclamation calling a special session of the legislature for the purpose of considering the invitation of the *Connor* Court.[6] A few days later, the legislature convened in special session and created the Special Joint Legislative Committee on Reapportionment (hereinafter referred to as the "Joint Committee").[7] The Joint Committee retained as its special counsel, Mr. Jerris Leonard of Washington, D.C., former Assistant Attorney General of the United States for Civil Rights.[8] The Committee interviewed outside experts on reapportionment suggested by the Attorney General of Mississippi,

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[6] Findings of Fact 8.

[7] *Id.* 9.

[8] *Id.* 9.

Special Counsel Leonard and Mr. Marshal Turner, Assistant Chief of the Demographics Staff of the United States Bureau of the Census. Of those interviewed, the Joint Committee selected Mr. Thomas Hofeller of California, Mr. Delbert Dunn of Georgia, Mr. Calvin Webb of New York and Dr. Richard Morall of the State of Washington, all experienced in reapportionment.[9]

The Committee and its staff were to pursue a twofold objective, i.e., preparation of plans both for consideration by the *Connor* Court in response to its invitation to the legislature, and for consideration by the legislature for the purpose of statutory reapportionment.[10] Before these experts commenced their task, they received legal guidance from the Committee's Special Counsel. *The experts and staff were instructed to minimize the population deviation among districts and to avoid dilution of black voting strength.* Subsidiary goals were to observe Mississippi's historical concern for the preservation of county lines and to create compact and contiguous districts.[11] The Committee staff, aided by the retained experts, commenced its efforts to construct reapportionment plans for Mississippi in August, 1977.[12]

Avoiding dual incumbencies was an ancillary objective which the Joint Committee attempted to achieve,

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[9] Findings of Fact 10.

[10] *Id.* 12.

[11] Different plans for presentation to the *Connor* Court and for consideration by the legislature as a statutory plan were prepared due to the greater flexibility accorded by this Court to legislatures in apportionment matters. *Chapman* v. *Meier*, 420 U.S. 1, 27 (1974).

[12] Findings of Fact 8 and 9.

but only so long as it could be accomplished while observing the criteria given to the Committee for devising the plan.[13] The first plans were devised without regard to incumbents. When requests for changes emanating from a dual incumbency situation arose, solutions were checked to assure that they did not adversely impact established criteria, especially those concerning the maintenance of *de minimus* deviation and avoidance of dilution of black voting strength. Although changes were made in the plan to avoid dual incumbencies, six senators and 16 representatives were pitted against each other for re-election, including the Chairman of the Joint Committee, Representative Thomas Campbell.[14]

The Joint Committee developed a computerized data base for the development of its reapportionment plans. The "base" was derived from 1970 census data not only because it provided a neutral data source and was considered to be accurate, but also because it was available for the entire State, collected by uniform methodology throughout the State, available for geographic areas within counties as well as for whole counties in the State, and was easily replicated and verified for any given district or area.[15]

The initial plans developed for submission to the *Connor* Court and for enactment by the legislature as a statutory plan were based on Census Enumeration Districts (ED's) rather than on precinct lines. Precincts in Mississippi do not correspond with ED lines,

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[13] *Id.* 14.

[14] *Id.*

[15] *Id.* 15.

nor is census information uniformly available by precinct throughout the State of Mississippi. ED's are thus the only basis upon which census information is uniformly available for the entire State. It was for this reason that the staff decided to develop its plans based on ED's.[16]

The process of developing the Joint Committee's ED plans was open to public participation and input. On October 11, 1977, and again on November 28, 1977, the Joint Committee conducted public hearings on the ED plans. These hearings were well-publicized in advance and opportunity was afforded to all interested parties to submit their suggestions and objections.[17] The Joint Committee was responsive to suggestions obtained during the public hearings. Suggestions from black leaders and black-oriented social and political organizations were incorporated into the plans whenever the resulting redistricting was feasible in view of other criteria governing the formulation of the plans.[18]

When the Joint Committee's ED-based plans were finally to be submitted to the legislature, a special session was called for this purpose in December, 1977. The legislature expressed a preference for plans using precinct lines as a means of avoiding voter confusion and of eliminating the need for re-registration of voters.[19] Because of the preference expressed for precinct lines,

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[16] Testimony of Appellee's reapportionment expert, Hofeller, Trial Transcript ("Tr."), pp. 196-198.

[17] Findings of Fact 20.

[18] *Id.* 21.

[19] *Id.* 16. This view was consistent with the view of the *Connor* Court which also rejected the ED plans and indicated its preference for precinct plans.

the Joint Committee staff was directed to convert the ED plans to precinct plans by moving the boundaries of the districts based on ED's to the nearest precinct line.[20] The resulting shift from the ED-based plans to precinct-based plans was primarily a matter of refinement. It is not disputed that the basic configuration of the districts contained in the orignial ED plans and those of the resulting precinct plans were essentially the same.[21]

The legislature ultimately adopted the reapportionment plans which were based exclusively on single-member districts in both the Senate and House and utilized precinct lines in place of ED lines. The Governor of Mississippi, before signing the bills into law, sought input from black organizations, including the NAACP. In addition, the Governor sought the view of his cabinet-level Multi-Cultural Advisory Committee with regard to the impact of the proposed plans upon

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[20] *Id.* 17. The Mississippi legislature sits for only 90 days. (Mississippi Constitution, Article I, Section 36) What had to be done in order to make the transfer from ED-based plans to precinct-based plans had to be accomplished prior to March 30, 1978. (The actual voting process began on March 23, 1978. Plaintiff's Exhibit [PX] 47, 47A) Although the configurations had been determined in December, the task facing the Committee as the legislature convened in January, 1978, was a time-consuming one. In order to convert the plan to precincts, the Joint Committee found it necessary to obtain data on the ED's when split by precinct lines. The Joint Committee staff would draw the split of an ED on a Census Bureau map of the ED and forward the map to the Census Bureau. The Census Bureau would return the population figures for both sides of the line which split the ED. The Census Bureau, however, could not provide the exact racial composition of the split. This was determined by a computerized allocation of black and white population within the ED to each side of the "split" line. Tr. 194-197, 274.

[21] Findings of Fact 19.

minorities. His efforts elicited no complaint from the black community regarding the plans before him for signature.[22] On April 21, 1978, the Governor of Mississippi approved and signed into law S.B. 3098 and H.B. 1491, the statutory reapportionment plans now before this Court.[23]

On June 1, 1978, S.B. 3098 and H.B. 1491 were submitted to the Attorney General of the United States for Section 5 pre-clearance. The delay in making the submission from April 21, 1978, to June 1, 1978, was caused by the failure of the Department of Justice to make information in its files available to the State.[24] During the summer months of 1978, while the statutory plans languished in the Department of Justice in Washington, the *Connor* Court, in a June 12, 1978, order, found that the differences between the parties appeared resolvable, and ordered the parties to attempt to settle these differences.

As time went by, the Attorney General of Mississippi, A. F. Summer, became concerned that the Department of Justice's adversary position in the *Connor* litigation would adversely affect its view of the reapportionment plan submitted for Section 5 pre-clearance.[25] With that

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[22] Finch, Tr. 299-302. It should also be noted that the lead appellant, Aaron Henry, is President of the Mississippi NAACP, Co-Chairman of the Mississippi Democratic Party and is a member of the Governor's Multi-Racial Advisory Committee with easy access to the Governor. Mr. Henry testified that he made no objection to the Governor's approving the reapportionment bills. Henry, Tr. 779-780, 801-802.

[23] Findings of Fact 23.

[24] *See* the affidavit of Jerris Leonard, Esq. which is part of the record in the Court below.

[25] The United States was plaintiff-intervenor in the *Connor* litigation.

specific concern in mind, on July 26, 1978, Mr. Summer directed a letter to the Attorney General of the United States, providing in pertinent part:

> Our present concern is that the lingering effect of differences between Mississippi and the Department of Justice during the apportionment litigation of the past and present not affect fair and impartial consideration of our Section 5 Application. We feel that it may be too great a burden and place your Civil Rights Division in an awkward position if they are asked to make a determination on the acceptability of our statutory plan when embroiled in litigation on the same subject matter. This is so because to approve our Section 5 statutory plan, the Civil Rights Division would have to abandon the plan it has been advocating before the three judge court in Mississippi.
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> * * *
>
> We request a fresh perspective on our Section 5 submission. We respectfully request an opportunity to meet with you and have you decide whether the statutory plan enacted by our legislature denies or abridges the right to vote of any citizen in Mississippi on account of race.[26]

On July 31, 1978, Assistant Attorney General for Civil Rights, Drew S. Days III, signed a letter purporting to interpose an objection pursuant to Section 5 of the Voting Rights Act. The letter stated that "we have been unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color."[27] Mississippi did not receive notification that the Attorney General

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[26] Days Dep. Ex. No. 1.

[27] Days Dep. Ex. No. 4, PX 25.

had objected until August 1 (the 61st day).[28] On the same day that Mississippi received notification of the adverse action of the Department of Justice (Department), the State filed a lawsuit against the United States in the court below seeking a declaratory judgment.[29]

At the time Mississippi filed its complaint, its was unaware of the cursory treatment that its Section 5 submission had received within the Department. A law student was assigned to conduct the review, analyze and make recommendations as to the position that should be taken by the Department with regard to Mississippi's submission. The law student, who was neither an expert on the subject of reapportionment nor on the subject of racial demographics, testified that he did not even know whether he had received any instructions on how to proceed with review of the submitted reapportionment plans.[30] Nonetheless, in a letter drafted by him and signed by Assistant Attorney General Drew S. Days on July 31, 1978, the Department of Justice rejected reapportionment plans which had been carefully prepared by the State's retained reapportionment experts. The draft of the letter constituted the initial decision within the Department to object to the Mississippi submission.[31] Despite the request of the Attorney General of Mississippi for an audience with the Attorney General of the United States for the purpose of discussing S.B. 3098 and H.B. 1491 prior to

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[28] Findings of Fact 26.

[29] *Id.*

[30] Tr. 1226-1227, 1284.

[31] Hunter Dep., 13-19.

final action, the matter was not even called to the attention of Attorney General Bell by Department personnel in the Civil Rights Division who were clearly aware of Attorney General Summer's request.[32] Further, Assistant Attorney General Days, who signed the draft, did not even read Mississippi's submission. (It goes without saying that the Attorney General of the Whatever the authority of Assistant Attorney General United States did not read the submission either.)[33] Days to act for the Attorney General in Section 5 matters, he essentially abdicated it to a law student with no particular expertise in the subject area of reapportionment. This left Mississippi with no meaningful recourse but to seek declaratory judgment relief.

At the time the Section 5 suit was filed, settlement negotiations which were initiated pursuant to the direction of a June 12, 1978, order of the *Connor* Court, were nearing conclusion. Although the parties had narrowed their differences, no agreement had been reached. On August 2, Circuit Judge Coleman of the *Connor* panel, in a conference with counsel for all parties, expressed concern that agreement had not been reached. Judge Coleman made it clear during the conference that unless a settlement plan was arrived at, the *Connor* Court would draw its own plan reducing the number of Senate seats from 52 to 45, and the number of House seats from 122 to 90, i.e., a "45-90" plan.[34] The so-called "settlement plan" referred to in the opinion below is the reapportionment scheme which resulted from the attempt by the parties in *Connor* to

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[32] Days Dep., 9-11.

[33] *Id.*, 16-20, 32-35.

[34] Tr. 360-363.

resolve their differences following the August 2, 1978, conference with Judge Coleman.[35] It was based upon the statutory plan with changes made to accommodate certain desires of the black plaintiffs in *Connor*.

Trial on the Section 5 case commenced on September 18, 1978, and consumed eight trial days from September 18, through September 27, 1978. In order to expedite the proceedings, plaintiff (Mississippi) took depositions during trial recesses. At the trial's conclusion, the parties were directed to file post-trial briefs and proposed findings of fact and conclusions of law by October 31, 1978. All parties were thereafter given 15 days to respond to briefs of opposing parties.

The settlement plan was introduced in evidence over the objection of the State during trial proceedings before the Section 5 Court. At the time it was introduced into evidence, it had not been adopted by the *Connor* Court as its judgment. All parties before the Section 5 Court conceded that the settlement plan satisfied the requirements of Section 5 and of the United States Constitution.[36] The two plans contained

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[35] An explicit caveat was appended to the legislature's informal acquiescence in the "settlement plan." Because of the caveat, the settlement plan never matured into the consent decree Judge Coleman had hoped for. The caveat was unrelated to the geographical contours of the settlement plan. The State wanted assurance that no party would use the "settlement plan" in Section 5 proceedings to challenge the statutory plan which had been enacted at a time when the "settlement plan" did not exist. Appellants refused to provide such assurance. *Cf.* FED. R. EVID. 408.

[36] It is interesting to note that the same Department of Justice which, after 60 days of study by a law student who was not an expert in reapportionment matters, came to a conclusion that

the same number of districts (16) with 60% or more Black Voting Age Population (BVAP), but the settlement plan contained three more black population majority districts (49 as opposed to 46) and three more majority BVAP districts (39 as opposed to 36).

On October 12, 1978, Appellants filed a motion for judgment in the *Connor* litigation. The motion proposed that the *Connor* Court enter the settlement plan as its final judgment. *Connor* v. *Coleman*, 440 U.S. 612, decided March 26, 1979.[37]

On April 13, 1979, pursuant to the order of this Court, *Connor* v. *Coleman, supra,* the *Connor* Court entered judgment on a plan which has been conceded by all parties to the litigation below to be substantially identical to the settlement plan insofar as its treatment of racial minorities is concerned.[38] There were,

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Mississippi's statutory plan violated Section 5, later readily agreed that the *Connor* settlement plan, as to which the Section 5 Court recently noted "we conclude that the slight differences are not of such significance to find that the statutory plan was retrogressive with respect to black voting strength in Mississippi as it is today," (Conclusions of Law 20) satisfies both Section 5 and the Constitution.

[37] No action on Appellants' motion for judgment in *Connor* had been taken by the *Connor* Court at the time of final arguments before the Section 5 Court on January 16, 1979. Subsequent to arguments before the Section 5 Court and while awaiting a decision from that Court, Appellants filed a petition for a writ of mandamus directed against the three-judge *Connor* Court. Appellants asked this Court to direct the *Connor* Court to announce a decision. In a *per curiam* opinion, *Connor* v. *Coleman, supra,* this Mississippi legislature "forthwith and without further delay." 440 U.S. at 614.

[38] Findings of Fact 29.

however, substantial differences totally irrelevant to this Section 5 case.[39]

With the foregoing facts before it, the Section 5 Court proceeded to compare the statutory plan with the *Connor* Court plan to determine whether a retrogression in black voting strength would occur if the statutory plan were allowed to go into effect.[40] It concluded that the statutory plan, when compared with the *Connor* Court plan of April 13, 1979, was not retrogressive and did not have as its purpose and would not have the effect of denying the right to vote on account of race.[41]

On June 7, 1979, Intervenors below filed a motion before the Chief Justice, as Circuit Justice for the District of Columbia, asking that the decision of the district court be stayed pending appeal. *Aaron E. Henry, et al.* v. *Mississippi,* No. A-1067. On June 18, 1979, that motion was denied.

On November 6, 1979, statewide legislative elections were held in Mississippi under the Section 5 plan approved by the court below. As a result of those elections, black representation in the State legislature increased threefold.[42]

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[39] *See* the affidavit of Scott Levanway filed in the proceeding below.

[40] *Id.*, 45-47.

[41] The Appellee, however, does not incorporate by reference to the *Connor* plan any argument that the compromise or settlement plan was a valid or logical antecedent comparative plan. It still strongly believes that the 1975 court-ordered plan was the correct comparison benchmark. See discussion at Part II, *infra,* 49-53.

[42] *See* Appendix for tables compiled by the Legislative Counsel to the Mississippi State House of Representatives, comparing partial election results for black candidates throughout the State in

ARGUMENT

I. THE STATE MET ITS BURDEN OF PROOF ON "PURPOSE" AND THERE WAS NO SHIFTING BY THE COURT OF THAT BURDEN TO APPELLANTS.

Appellants contend that the Section 5 Court erred by assigning to them the burden of proof on the State's purpose in enacting the statutory plan and in the trial court's ultimate finding that the evidence demonstrated that the State's purpose was "benign."

We submit that the court properly placed the burden of proof regarding "purpose" upon the State at the outset and never shifted that burden. Appellants' contention to the contrary can be supported only by resorting to a twisted construction of the ruling below.

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key districts for both House and Senate. We ask the Court to take judicial notice of these results. In all, 15 blacks were elected to the House and two to the Senate. We believe this increase to be both dramatic and significant evidence of the State's good faith endeavor to increase the opportunity for the election of black candidates to its legislature, especially where the pre-existing plan was drawn by a federal court. At page 2 of their Jurisdictional Statement, Intervenors below note that Mississippi is 37% black (31.5% BVAP according to the 1970 Census), but that prior to the most recent elections had only five black elected members of the State legislature. "This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." *Beer* v. *United States,* 425 U.S. 130, 136, n. 8 (1976). *See also Whitcomb* v. *Chavis,* 403 U.S. 124, 149 (1971); *Richmond* v. *United States,* 422 U.S. 358, 368 (1975); *Washington* v. *Davis,* 426 U.S. 229, 239 (1976); and *White* v. *Regester,* 412 U.S. 755, 765-766 (1973). If blacks were uniformly spread throughout the State, there could be no black majority districts. The best that a minority can expect is that demographic patterns, which cannot be dictated by the legislature, are fairly reflected in any apportionment scheme. The statutory plan is consistent with geographic distribution of black population in Mississippi. *See* Findings of Fact 40.

Appellee produced overwhelming evidence that the State's agents, charged with responsibility for devising the reapportionment plans, acted without discriminatory purpose. Indeed, the evidence shows that the State's agents acted with the affirmative purpose of creating "winnable" black legislative seats and, irrespective of Appellants' contention that the trial court improperly placed the burden upon the Defendants and Intervenors below, it is clear from the record that the State nevertheless assumed the burden of proof on the issue and went forward to produce overwhelming evidence of nondiscriminatory purpose on the part of its agents.

A. The Trial Court Did Not Shift the Burden of Proof on "Purpose" to the Appellants.

Most laws are clear on their face as to their meaning and simple logic usually permits reasonable inferences to be drawn as to their impact on different segments of the populous. A statewide reapportionment plan, however, is by nature technical and complex. Inquiry as to why individual legislators ultimately voted for it would be "extremely difficult for a court to ascertain." *Palmer* v. *Thompson,* 403 U.S. 217, 224-225 (1975). Most of those who supported it obviously did so because they had faith in the Committee and its staff. Thus the "state of mind" of the plan's drafters is the "scienter" we must look to with regard to the issue of purpose.

As we will demonstrate in Subsection B., *infra,* there was ample proof upon which the court below could and did make an affirmative finding that the statutory reapportionment plan was drafted by persons operating free of any racially discriminatory purpose. The

State's proof as to this purpose, we submit, could withstand a much more exacting standard than mere preponderance of the evidence. The record below demonstrates that Mississippi's trial proof in this regard would have supported the judgment even if the standard had been proof beyond a reasonable doubt.

Despite the overwhelming evidence introduced showing that Mississippi's statutory plan was prepared by persons acting without invidious motivation, Appellants grasp at straws. They point to Conclusion of Law No. 21 and contend that the district court erred by placing the burden on Appellants to affirmatively prove that the State acted with an invidious purpose. Not only is this assertion irrelevant in light of the record evidence below, but in order to make it, Appellants must wrench a part of the district court's Conclusions of Law from context. The district court specifically concluded in paragraphs 9 and 11 of its Conclusions of Law that the burden lay with the State to demonstrate and prove that the State was not motivated by a racially discriminatory purpose:

> 9. In an action for declaratory judgment under Section 5, *the burden of proof is on the plaintiff*. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966) [emphasis added].
>
> 11. Mississippi, *in meeting its burden of proof*, must demonstrate that a *racially discriminatory purpose* was not among the factors that motivated it in devising its reapportionment plan. *Richmond* v. *United States*, 422 U.S. 358, 362 (1975) [emphahis added].

The above paragraphs clearly indicate that the district court viewed the evidentiary standards to be

exactly as the Appellants viewed them. Taking the district court's findings and conclusions as a whole, the reference by the trial court to *Washington* v. *Davis,* 426 U.S. 229 (1976) in Conclusion of Law No. 21 was thus obviously not intended to assign the burden of proof regarding "purpose" to any party. Rather, the reference was intended to define the meaning of the term "purpose" in a Section 5 case. The burden of proof on "purpose" had already been placed upon the State in Conclusions of Law 9 and 11 cited above.

The trial court was unquestionably correct in its definition of "purpose" as that term is used in Section 5. Speaking to the meaning of the concepts of "purpose and effect," Mr. Justice Stevens perceived that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion[s] might assume." *Washington* v. *Davis,* 426 U.S. at 254 (concurring opinion). Both considerations, purpose and effect, have a bearing on each other. Findings of fact as to the genesis and consequences of the statutory plan were, under the statute, the obligation of the district court, but the burden of proof was clearly on the State. As the trier of fact, the Court made a detailed investigation—as the record of over 1500 pages indicates—and made a finding that there was no discriminatory purpose or effect in the formulation of the statutory plan.[43]

Concededly, Mississippi used race and other salient factors in drawing the plan *sub judice.* The district court in fact found that the legislature had considered race as a factor in its determinations, but that in so

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[43] *See* Findings of Fact 48 and Conclusions of Law 22.

doing, it purposefully designed the statutory plan so as *not* to have the proscribed negative effect on the participation of minorities in the electoral process. Rather, the court found that the legislature affirmatively created "safe" black electoral districts."

Pursuant to the landmark case of *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1977), it is well-established that it does not adversely jeopardize any statutory plan for the legislature " 'to think in racial terms,' " 430 U.S. at 145, 154-155, 161-162, as long as it does not do so "*invidiously* to cancel out or minimize the voting strength of racial groups." *White* v. *Regester,* 412 U.S. at 765 (emphasis added). Such a proscribed invidious use has been held to be one that must comport with the disingenuous intent "*designedly* or otherwise, [for] a multi-member constituency apportionment scheme, under the circumstances of a particular case, . . . [to] operate to *minimize or cancel out* the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey,* 379 U.S. 433, 439 (1965). To fall under this proscription, it is clear that State action must be such as to "*deliberately* and *systematically* [deny members of] a minority race the right to participate" in the process in question. *Washington* v. *Davis,* 426 U.S. at 240, quoting *Alexander* v. *Louisiana,* 405 U.S. 625, 628 (1972) (emphasis added). Acting outside the legislative prerogatives long recognized by this Court, therefore, it must have been found that the drawing of legislative districts "throughout the State, *were conceived or operated as purposeful devices to further racial or economic discrimination.*" *Whitcomb* v. *Chavis,* 403 U.S. at 149

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[44] Findings of Fact 48.

(emphasis added). This concept of legislative culpability is one which this Court has never shrunk from disciplining. Nor has it had any particular difficulty in applying the clarity of the standard: "The answer is plain, and we need not labor it. An official action, . . . *taken for the purpose of discriminating against Negroes on account of their race* has no legitimacy at all under our Constitution or under the [Voting Rights] statute." *Richmond* v. *United States,* 422 U.S. at 378 (emphasis added).

Proving a negative is never an easy task. Section 5 places the burden on the proponent political jurisdiction. The State accordingly went forward with proof to establish the total absence from legislative determinations of the kind of pernicious bias inherent in the racial standards which have been placed under "suspect classifications" in this Court's previous rulings and which constitute the prohibited "purpose" against which Section 5 seeks to safeguard. The district court accepted this evidence while finding there was no credible evidence from Appellants in support of a contrary finding.

Appellants complain that the court below ignored evidence that districts were designed for the purpose of preserving incumbents, "most of whom are white," in office [45] with the forseeable result of districts which dilute the black vote. *Compare Wright* v. *Rockefeller,* 376 U.S. 52, 66 (1964) (Douglas and Goldberg, J.J., dissenting). The State, however, went forward with evidence and the lower court found that the statutory plan was initially drawn without reference to the residences of incumbents. It was only after the first version

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[45] Intervenors Jurisdictional Statement at 3.

of the plan was drawn that residences were checked to see if it pitted incumbents against each other. Even then, district boundaries were only changed for incumbencies' sake if the change did not produce a racially discriminatory result.[46] Even so, many legislators found themselves running against each other under the new plan.[47] This practice is a proper exercise of legislative authority and not invalid *per se*. *See Burns* v. *Richardson,* 384 U.S. 73, 89, n. 16 (1966) and *White* v. *Weiser,* 412 U.S. 783, 791 (1973). This issue is, therefore, even more *de minimus* than others raised by Appellants and the district court accorded it its due consideration.

It is not this Court's function or duty, therefore, to undertake a *de novo* consideration of the evidence below. The trial court weighed and evaluated the evidence on "purpose" and Appellants make no assertion that the Findings of Fact below relating to "purpose" are clearly erroneous. Thus, weighing and evaluating the credibility of Appellants' evidence, it was not irrelevant for the trial court to link Intervenors' contentions to their political ambitions.[48] Indeed, the best evidence

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[46] Findings of Fact 14.

[47] See page 7, *supra.*

[48] *See* Findings of Fact 47, n. 3. As Mr. Justice Douglas earlier observed in *Oregon* v. *Mitchell,* "Their subsequent attempts to achieve by assertion what they had not had the votes to achieve by constitutional processes can hardly be entitled to weight." 400 U.S. 112, 195 (1970) (dissenting opinion). *See also* Intervenors' Jurisdictional Statement at 24 and Government's at 24. *Beer* v. *United States,* 425 U.S. 130, 157 (Marshall and Brennan, J.J., dissenting) and *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 186 (Burger, C.J., dissenting). As Mr. Justice Harlan opined, "The fact that Negro political leaders find advantage in this nearly-solid Negro . . . district is irrelevant to our problem.

of the unsubstantial nature of the issues in this lawsuit and a direct contravention of Intervenors' major premise is the fact that one of the 17 blacks elected to the Mississippi legislature in the statewide elections of November 6, 1979, is the lead Appellant in Intervenors' case, Aaron Henry. He was elected to the State House of Representatives from Coahoma County (Clarksdale), under the same plan he and his colleagues are indicting in this appeal.[49] This is the same Intervenor who, at the trial below, participated in the following colloquy with the Court and the State Attorney General:

> THE COURT: But one of the contentions that has been made in this case is that black leaders weren't given an opportunity to participate. And what I'm trying to point out is that at least as far as you, Mr. Aaron Henry was [sic] concerned, that you could have participated if you had wanted to.
>
> THE WITNESS: I think I could have, yes, if I had decided to, yes. [Tr. 771] * * *
>
> Q. [BY ATTORNEY GENERAL SUMMER:] So really, Dr. Henry . . . you really feel regardless of what the legislature may be, that *it's your preference to go through the courts and not let the legislature act on things*——
>
> A. As you know, generally, *that's my feeling.* * * *
>
> Q. It is my understanding that you prefer that in other matters as well as reapportionment?
>
> A. Sure.

Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright* v. *Rockefeller*, 376 U.S. at 62.

[49] See discussion of the political implications of the statutory plan, *infra*, 35-49.

> MR. SUMMER: That's all we have, Your Honor.
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> * * *
>
> THE COURT: I have a couple of questions. I was going to ask them a long time ago, but I think Mr. Summer brought it out at the end.
>
> But if you had two identical plans, one of the statutory plan and one the same plan submitted by the Court, you would prefer the Court plan to the legislative plan.
>
> THE WITNESS: I would for this reason Your Honor. * * * I think that that kind of reaction would give all of us more of a desire to try to make it work. [Tr. 801-803] [emphasis added].

In the face of such an admission, it was not difficult for the court below to see through the challenge to the State's efforts. Its conclusions as to the state of mind, or purpose, with which the agents of the State acted should be affirmed.

B. There Was Overwhelming Evidence to Support the Court's Finding That the Statutory Plan Was Drafted Without the Purpose Prohibited by Section 5.

After setting forth the facts surrounding the development of the statutory plan in detail, the court stated in Conclusion of Law No. 22:

> Mississippi's evidence demonstrates that the principal actors in the development of S.B. 3098 and H.B. 1491 acted with a benign purpose.[7] Defendants concede they have no evidence to the con-

[7] The basic configuration of the statutory plan was complete in December, 1977, well prior to the submission to the *Connor* Court of various alternative plans, which culminated in the settlement plan adopted by the *Connor* Court on April 13, 1979.

> trary and are unable to name anyone they contend acted with improper purpose. Defendant-intervenors, likewise, failed to introduce such evidence.

It is elementary that findings of fact cannot be set aside unless they are specifically found to be "clearly erroneous." *United States* v. *National Ass'n. of Real Estate Bds.*, 339 U.S. 485 (1950). The possibility that this Court might give the facts another construction, resolving ambiguities differently and thus assigning a sinister cast to actions which the district court deemed benign, provides no succor to Appellants. This Court is not in a position to substitute its evaluation of the evidence for that of the trial court. Appellants have the burden of demonstrating that the district court's findings of fact were clearly erroneous and that burden cannot be met when, as here, the district court's findings are well-supported by findings of fact based on the record evidence.

In their Jurisdictional Statement to this Court, Appellants do not name any person whom they contend acted with improper purpose. Instead, they seem to suggest that there was sufficient evidence from which the court should have inferred some sort of emphemeral invidious force motivating anyone working on behalf of the State. Appellants in this regard allude to (a) a past history of discrimination by the State; (b) evidence of concern for incumbents in the drafting of the statutory plan discussed above at pages 7 and 22-23; and (c) the construction of a handful of particular districts, which they contend fragment and dilute black voting strength when alternative configurations more acceptable to the black Intervenors were known to agents of the State prior to passage of the State's plan.

When the genesis of the State's plan and the so-called "alternative configurations" are considered, however, it is clear that the State acted without invidious purpose.

The Section 5 Court found that the House plan (H.B. 1491) was drafted by Thomas Hofeller and the Senate plan (S.B. 3098) was drafted by Earl Fortenberry.[50] They were the "principal actors" in the development of these plans.[51] Both of these individuals testified as to their respective roles in fashioning the reapportionment plans. No court could believe their testimony and yet find that the reapportionment plans had been drafted with a racially discriminatory purpose. The Section 5 Court found them to have acted with a benign purpose.[52] No evidence contradicting their testimony or impeaching their credibility was introduced. Their testimony that they acted with the purpose of affirmatively creating BVAP majority districts in areas of the State with concentrations of black voters likely to elect candidates of their choice to the Mississippi legislature completely obviates any adverse inference that could be drawn based upon Mississippi's history. The trial court believed and relied on their testimony in this regard.[53] To counter the sworn testimony of the State's retained experts, Appellants build their attempt to show discriminatory purpose primarily by focusing on the configuration of a handful of particular legislative

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[50] Findings of Fact 22.

[51] Hofeller's testimony can be found at Tr. 121-202, 222-274, and 1453-1511; Fortenberry's testimony can be found at Tr. 450-544.

[52] Conclusions of Law 22.

[53] Findings of Fact 48.

districts within the statutory plan and comparing them with alternative configurations in the *Connor* settlement plan. They contend that the State drew a plan with irregularly-shaped districts which fragment and dilute black voting strength when alternative plans exhibiting contiguity, compactness and lower population variances were at hand,[54] and make the assertion that the district court erroneously concluded that these alternatives were not made known to the State's experts until after the basic configuration of the statutory plan was completed.

The fact that there is evidence to show that Committee members were completely open and responsive to suggestions by members of the black community belies any notion that they deliberately closed their eyes to the limited number of alternative configurations preferred by the black Intervenors below. Indeed, we contend that the alternative configurations urged below were either not available at the time the Committee needed them or that the black community, in certain instances, was ambivalent as to exactly what it intended or desired.

We have referred above to the October and November, 1977, widely-publicized public hearings. At the November hearings, Representative Horace Buckley, a black legislator from Hinds County and a member of the Joint Committee, appeared and made suggestions for the House plan which were contained in a memorandum.[55] The memorandum was drafted by Rims Barber, a long-time associate of Frank Parker, Esquire, coun-

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[54] Intervenors Jurisdictional Statement at 24 and Government Jurisdictional Statement at 13, 24-25.

[55] Campbell, Tr. 638-639; PX 24.

sel for Appellants in this case. (Mr. Parker is also counsel for plaintiffs in *Connor*.)[56] The overwhelming majority of suggestions in the "Barber Memorandum" were incorporated into the final statutory plan by the Committee staff.[57]

The responsiveness to Buckley and the suggestions of the Barber Memorandum are not the only instances in which the record below reflects a concern on behalf of the Committee for input from blacks interested in the drafting process. In addition to relying on Barber's suggestions, Representative Buckley had earlier requested that the number of black majority House seats in Hinds County be reduced from five in a draft plan then under consideration, to four. His request was honored.[58] He desired to reduce the number of black majority districts in Hinds County in order to increase the black percentages of those remaining.[59]

Others speaking on behalf of black interests found similar responsiveness to their suggestions from the Committee while the statutory plan formulation was in an embryonic stage. Robert Clark is a black representative from Holmes County,[60] re-elected in the recent

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[56] Rims Barber has been active in black political efforts in Mississippi for a number of years. He has been interested in reapportionment problems throughout the State. (Campbell Tr. 639) He attended depositions with Attorney Frank Parker in Washington, D.C. in this case. (PX 36 ,37B, 38A, 39A, 40A, 41A, 42A) He is associated with the plaintiffs in *Connor* (Hofeller, Tr. 1486) and has been consulted by the defendant-intervenors here. (Schoby, Tr. 986; Kirksey, Tr. 905; Parker, Tr. 649).

[57] *See* Findings of Fact 47(c), n. 4.

[58] Hofeller, Tr. 206-207.

[59] Findings of Fact 47(b).

[60] Hofeller, Tr. 182, 201.

general elections of 1979. Conversations with Clark indicated that he desired a single House district within Holmes County so that it would be better for a black to run in, but with certain black precincts removed so as to eliminate a political opponent from his district.[61] Clark's desires were accommodated in the statutory plan.[62] Clark also sought modifications of the treatment of Holmes County in the Senate plan. The Senate configurations for Holmes County presented at the public hearings divided Holmes into three parts. In response to Clark's request to limit the division of Holmes, which did not have enough population to support a senatorial district of its own, the present configuration which divides Holmes into two parts was fashioned.[63] Representative Clark then voted for the entire plan.[64]

Walter Brown was an unsuccessful black candidate for the legislature from Madison County. He was interested in a particular configuration of districts from that area and expressed his views to his Representative. The result was the construction of the district in accordance with his suggestions.[65]

Aaron Henry, one of the Appellants, made an appointment with his Senator, Jim Molpus, and attorney Frank Parker to acquaint Senator Molpus with the concerns of blacks regarding configurations in Henry's county of residence, Coahoma.[66] Henry's suggested con-

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[61] *Id.*, 201-202.

[62] *Id.*, 183.

[63] Fortenberry, Tr. 478-479.

[64] PX 47A.

[65] Tr. 656-657.

[66] Tr. 751, 782.

figurations, insofar as Coahoma County was concerned, were passed to the committee by Senator Molpus and were ultimately adopted.[67] Henry was elected to the legislature in the recent elections from that district.

The configurations in Adams and Washington Counties were based on the representations from legislators residing in those areas as to the desires of the black community.[68] Intervenor Schoby was elected to the legislature from Adams County.

The foregoing provides overwhelming evidence of affirmative response to input from the black community in the formulation of the final plans and is not diminished in any way by any other evidence in the case. The record instead reveals a "sandbagging" or "dog in the manger" approach to the legislature's efforts by the Appellants. One of them, Fred Banks, a black Representative from Hinds County, refused to provide any input with respect to the drawing of any legislative districts, as demonstrated in the following testimony of Hofeller:

> Q. Now did they [the black members of the legislature] provide input to you, their ideas with respect to the drawing of any of the legislative districts?
>
> A. Some of them did and some of them wouldn't.
>
> Q. Who wouldn't?
>
> A. Mr. Banks did not. Mr. Anderson provided some limited input in terms of his own district. Mr. Buckley [who] was a member of the committee, provided a considerably greater amount of input in all of the committee meetings and in written form.

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[67] Tr. 657, 783.

[68] *Id.*, 657-658.

> Q. Did you ask Representative Fred Banks if he had any specific suggestions for you with respect to the drawing of the House plan?
>
> A. I approached Mr. Banks and I asked him, I believe, asked him why he was not giving any input into the plan and suggested that it might be a good thing to hear some of his objections, or perhaps some things he liked about the plan. [Hofeller, Tr. 178-179]

Chairman Campbell also attempted unsuccessfully to solicit Banks's view.[69]

Dr. Aaron Henry, Co-Chairman of the Mississippi Democratic Party, a prominent black leader and President of the Mississippi NAACP, was also a member of the Governor's staff and by his own declaration had access to the Governor at any time he desired.[70] Henry was aware of the reapportionment efforts from the outset but never discussed the matter with the Governor or availed himself of any opportunity to attend public hearings on the matter, public hearings of which he was fully aware. Henry, a long-time friend of Appellee's counsel, Jerris Leonard and Attorney General Summer, stated his preference that the matter be addressed solely in the federal court, even if the plan offered by the Court was identical to that which could be obtained through the legislature.[71]

Appellant Kirksey, despite his professed awareness and concern, attended none of the public meetings and did not communicate with his representatives in the

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[69] Campbell, Tr. 636.

[70] See p. 10, n. 22 and p. 24, *supra*.

[71] Henry, Tr. 779- 780, 769-772, 802.

legislature any of his self-described expertise in maps and census data, especially with regard to certain particularized areas of the State with which he claimed to be intimately familiar. The record reveals no evidence that he offered assistance or guidance to the Committee technical staff, yet he was offered to the Court as a witness on the effect of the statutory plan in all apparently disputed areas.[72]

Appellant Bennie Thompson, Mayor of Bolton, a town in Hinds County, fully informed of the proposed plans through his awareness of the public notice, felt so strongly about the matter that he left the country without making any effort to contact the legislature to suggest how the plans should be drawn.[73]

Defendant-Intervenor Schoby, like Thompson, refused to discuss the matter or otherwise cooperate with the legislature, the Committee, its counsel or its staff.[74]

The only evidence of contact by Frank Parker, Esquire, or anyone affiliated with the Lawyers Committee for Civil Rights Under Law, with the Joint Reapportionment Committee was that of Rims Barber previously discussed. Barber's comments had previously received favorable treatment, as demonstrated above, and Appellants must have had every reason to believe that other similar requests would have been favorably received by the Committee. The absence of input from anyone but Barber brought the following comment from Hofeller:

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[72] Kirksey, Tr. 810-816, 904-906.

[73] Thompson, Tr. 964-968. Thompson, incidentally, was elected to the Hinds County Board of Supervisors in the recent elections.

[74] Schoby, Tr. 984-985.

> Q. Did anyone from the Lawyers Committee on Civil Rights Under Law [sic] make any contact with you with respect to suggestions for these plans?
>
> A. No. As a matter of fact, in one of my discussions with Mr. Barber, I asked him why aren't the people who object to these plans and who are on the other side of law suits speaking out? Why aren't we getting input? And I posed that question. [Hofeller, Tr. 192]

At the same time, the Department of Justice made an affirmative decision to refuse to contribute to, and was totally unresponsive to direct requests from, the Committee regarding suggestions and guidance in drafting the plan.[75]

Acting in reliance on well-publicized hearings and the openness of the process to "flush out" objections or reservations, the legislature settled on its basic configuration in December, 1977, and the remaining effort, as previously noted, was the refining process of moving from E.D.'s to precinct lines.[76] The record fails to show that any of the alternatives preferred by blacks were available and presented to the Committee for its consideration in the ordinary course of the legislative process until after the public hearings had concluded and a basic configuration had been agreed upon.

In the face of this record, the contention by the Appellants that the State failed to adopt "available" al-

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[75] Fortenberry, Tr. 474-475; Campbell, Tr. 671-672; Days Dep. 102; PX 25.

[76] "The basic configuration of the statutory plan was complete in December, 1977, well prior to the submission to the *Connor* Court of various alternative plans, which culminated in the settlement plan adopted by the *Connor* Court on April 13, 1979." Conclusions of Law 22, n. 7.

ternatives is patently absurd. The proper method for presenting "available alternatives" to the legislature was through the forum provided by the open public hearings and through elected representatives; this simply was not done. There is an infinite number of possible configurations in any statewide apportionment scheme. The State had every right to rely on the public hearings, and other direct methods of input, to help the draftsmen focus on areas of concern. The plans the Committee drew fairly reflected the distribution of blacks geographically throughout the State."[11] Examination of the individual areas where Appellants complain of dilution clearly demonstrates that the Committee would have to have been clairvoyant to have anticipated what Appellants have complained of in this lawsuit. These specific areas are discussed in Finding No. 47 of the court below and we discuss them here. We note at the outset that Appellants' objections to these specific areas were discussed at length through witnesses and arguments to the trial court. The court took note in its opinion of these objections and rejected them as insignificant or unfounded.

WARREN COUNTY—HOUSE

Both the settlement plan and the statutory plan divide Warren into three parts and the City of Vicksburg within Warren into two. Appellants simply do not like the manner in which the legislature performed its division and complain that the settlement plan divides so as to provide a BVAP majority district whereas the statutory plan does not. The BVAP majority district created in the settlement plan, however, is below

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[11] Findings of Fact 40-43.

60% black VAP (56.22%) and thus does *not* provide, according to the Appellants' own expert testimony, and the finding of the court below, an opportunity for blacks to elect a candidate of their choice. As the Court noted, "It has been generally conceded that, barring exceptional circumstances such as two white candidates splitting the vote, a district should contain a BVAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice." [78] Thus, all that is accomplished for blacks in the settlement plan when compared to the statutory plan in Warren County is to increase the "influence" of black voters in one district while decreasing their influence in two others. The court below thus found the improvement for blacks in Warren in the settlement plan to be "marginal." Since the statutory plan configuration was in draft form at the time of the public hearings and no objection was raised, the whole issue is merely argumentative.[79]

LEFLORE COUNTY—HOUSE

The statutory plan conforms to a suggestion made by an associate of Appellants, Rims Barber, through Representative Buckley, a black member of the Joint Committee, at the public hearings on the statutory plan.[80] Appellants now complain about it. They say they do not like it because the 60% BVAP majority district created for Leflore in the statutory plan is predominantly rural, whereas the 60% BVAP majority district created in the *Connor* Court plan is pre-

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[78] Findings of Fact 36.

[79] See PX 2, PX 6, DX 1, DX 9, DX 11.

[80] Campbell, Tr. 645-646.

dominantly urban. Appellant David Jordan may be dissatisfied with the statutory plan because he was a candidate for the legislature from Leflore County and resides in the Leflore district which under the statutory plan is 37.73% BVAP (the adjacent district in the statutory plan is 64.26% BVAP) whereas, under the *Connor* Court plan, the line is drawn so that he fortuitously finds himself in a 71.72% BVAP district. It is difficult to comprehend how a charge of dilution can be leveled in a county where the BVAP is over 4% greater than that which the Civil Rights Division of the Department of Justice contends permits blacks to elect the candidate of their choice.

HINDS COUNTY—HOUSE

The objection to the statutory plan in this area is that there is no majority black district in the rural part of Hinds County. The *Connor* Court plan provides such a district (59.02%).[81] Again, the Appellants are asking the legislature to be prescient. The Hinds County districts were originally intended to follow as closely as possible existing districts in the 1975 plan which had been approved by the district court.[82] The Committee, however, was dissatisfied with the three BVAP districts which resulted and asked Hofeller to see if he could draw a configuration with more.[83] When Hofeller subsequently tendered a proposal with five BVAP districts in Hinds County, Representative Buckley, a

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[81] There is a typographical error in the Findings of Fact for Hinds County, 47.1(b). It was shown as a 69% BVAP district when it is clearly a 59% BVAP district.

[82] Findings of Fact 47(b); Hofeller, Tr. 395.

[83] Findings, *Id.*; Hofeller, Tr. 206.

black legislator from Hinds objected that it spread the black population too thinly and, in response to Buckley, the plan was modified reducing the number of BVAP districts to four.[84]

Appellant Thompson states at Tr. 963, "If you wanted to draw lines for rural Hinds County [to obtain the Appellants' desired configuration], you would have to draw them north/south." This is opposite to the manner in which the district court had previously drawn the lines in 1975. Thompson stated, at Tr. 964, that if the lines were drawn any other way, you would not get a black majority district in rural Hinds. Thompson, who lives in Bolton, a town in rural Hinds County, stated at Tr. 966-968, "I expressed my concern to [Representative Buckley] that the district as presently constituted severely reduced the effect of the black vote in rural Hinds County." Despite this expression of concern, the problem was not addressed in the Barber Memorandum given to the Committee at the public hearings by Representative Buckley.[85] Buckley, whose views had been incorporated in the final plan for Hinds County,[86] did not express any concern to anyone in the drafting process over this area or make any comment with respect to the drawing of a rural Hinds BVAP district. In fact, the Barber Memorandum states that if the plan for Hinds County was acceptable to Representative Anderson, another black Representative from Hinds County, "the plan can fly." Representative Anderson did not vote against the House bill and there is

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[84] Findins, *id.*; Hofeller, Tr. 206-207.

[85] Tr. 905-906.

[86] Hofeller, Tr. 206.

no evidence that he or any of the other three black legislators from Hinds County suggested to the Committee the formulation of a majority black rural Hinds district prior to the legislature's approval of the basic configuration for Hinds County in December, 1977.

In any event, as the trial court noted, the enhancement sought for black interests by the Defendants and the Defendant-Intervenors is of debatable benefit. The BVAP district that is created in the settlement plan by drawing the north/south lines in rural Hinds is less than the 60% magical figure quoted by Appellants' experts as being required to create a *winnable* black seat in the legislature. In order to create this black rural district, the court also observed that the black influence in adjacent districts would be diluted.

Nonetheless, the acid test of the viability of the statutory plan in this hotly-debated area was sustained by the results of the recent legislative elections. This area elected four black Representatives and two black State Senators to the State legislature. Whether blacks would have faired better than this substantial improvement under the alternative configuration is a matter of sheer speculation.

ADAMS COUNTY—HOUSE

In Adams County, Appellants complain about the inclusion of the predominantly white Morgantown precinct and the exclusion of predominantly black Airport precinct in District 95, the black majority district in this county. The configuration of this particular district in the statutory plan is basically the same as that proposed prior to the public hearings in November, 1977. The *only* suggestion made to the Committee with

respect to this district was contained in the Barber Memorandum given to Representative Buckley. At the time of the public hearings, the district had a black population of 61%. Mr. Barber indicated that "any slight shift would insure a black victory, although it is close the way it is." The Committee responded to this request by increasing the black population percentage to 63.23% and concomitantly increasing the BVAP to 60.23%, a winnable district for black candidates according to the expert testimony and the findings of the court below. The Committee, however, did not realize that it would not satisfy the Appellants unless the Morgantown precinct was eliminated. Having met both the 60%-plus BVAP magic figure requirement urged by the Justice Department and having adopted the changes suggested by those who traditionally attempt to protect black interests, the State could not be expected to have forseen this complaint.

Appellant Schoby is from Adams. His desire with regard to the Morgantown precinct was discussed prior to the public hearings with Appellant Kirksey and Counsel Parker.[87] He had run for office in that precinct and had not done well.[88] Schoby told Mr. Parker that he wanted him "to represent him fairly." He also had contact with Barber who had sent him copies of the draft statutory plans. After reviewing them, Schoby told Barber that he was not satisfied.[89] Schoby wanted Morgantown out and Airport in. Yet, for some unexplained reason, neither Barber nor attorney Parker

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[87] Schoby, Tr. 985.

[88] *Id.*, 986.

[89] *Id.*

chose to communicate Schoby's particular concern with regard to the Morgantown and Airport precincts to the Committee, a failure which can hardly be laid at the doorstep of the Committee.

The change Schoby sought through the settlement plan enhanced his personal chances for election to the legislature (66.45% BVAP as opposed to 60.23% BVAP), as the court below noted, "at the expense of diluting [the] neighboring district[s]."[90] The resulting increase of five percent in the BVAP might be construed to be for no other reason than to guarantee Schoby's safe election to the legislature at the expense of reduced influence for blacks in neighboring districts.

These objections are to be considered *prima facie* evidence of the unsubstantial nature of the issues in this case inasmuch as Mr. Schoby was, in fact, elected to the House from this district despite Appellants' protestations of dilution.

MARSHALL COUNTY—HOUSE

Appellant Kirksey stated the basic complaint of the Defendant-Intervenors below with regard to Marshall:

> Basically we are concerned about the fact that the most successful political activity in this county is centered in SD [Supervisor's District or "Beat"] 4 and that was basically the reason why we were attempting to include as much of that SD in District 5 as possible. [Kirksey, Tr. 864]

The configuration from the *Connor* plan, preferred and urged by Appellants below, splits the City of Holly Springs and by so doing keeps SD 4 intact. The Barber

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[90] Findings of Fact 47(c).

Memorandum indicates a preference for keeping the City of Holly Springs intact. In accordance with the Barber Memorandum, the statutory plan and its predecessors kept the City of Holly Springs intact and by so doing split SD 4.[91] Both alternative plans submitted to the *Connor* Court and approved by Appellants also split SD 4.[92] The Section 5 Court below took cognizance of this fact.[93] Appellants changed their position from that before the *Connor* Court to that before the Section 5 Court. The State cannot be required to have anticipated the apparent change in position. Their now-preferred Marshall County configuration was first called to the attention of the State eight months after the Legislative Committee had decided upon the basic configuration of its plan and four months after the legislature had voted.

Hofeller explains the effect of the late-blooming change in Marshall County sought by the Appellants as follows:

> [T]he change that was made to the statutory plan was to remove this precinct which would go up in a thin line . . . and into Holly Springs and take out the center or the east side of Holly Springs . . . and in exchange add the precinct south of this line to that district. [Hofeller, Tr. 374]

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[91] PX 2; DX 1-11.

[92] *See* D 1-3, Districts 3 and 4, p. 10; D 1-42, Districts 3 and 4; D 4, Districts 3 and 4, p. 1. These alternative plans include one by Intervenors' expert, Dr. Gordon Henderson, a local political scientist (Henderson Plan) and one by the Department of Justice, drawn by John Tanner, a second-year law student and paralegal with the Voting Rights Section (Tanner Plan).

[93] Findings of Fact 47.1(e).

The Court observed that "the sole difference between the plans lies in the allocation of one precinct."[94] This could hardly be categorized as having been racially motivated. "The attempt . . . was to create in Marshall County a logical compact district. That was the *motivation* in the creation of that district [emphasis added]."[95]

The result of the change sought by Appellants was to make an already majority BVAP district six percentage points higher. This six percent increase was gained "at the expense of creating an irregular-shaped district which split the only major city in that district."[96]

HINDS COUNTY—SENATE

As the court below noted, Appellants contend that the statutory plan forms a "seahorse-shaped" district in its Hinds County Senate plan that pairs a portion of the central Jackson black population with the heavily white south Jackson area. They contend that alternative plans proposed to the *Connor* Court are more compact and form black populations of over 60%.[97]

Before the elections in Hinds County, Appellant Kirksey was basically unhappy with Senate District No. 28 in the statutory plan, which has a BVAP majority of 62.93%. Kirksey was unhappy because, even though it is a 60%-plus BVAP majority in an urban area, winnable by the Appellants' own expert's defini-

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[94] *Id.*

[95] Hofeller, Tr. 376.

[96] Findings of Fact 47.1(e); Hofeller Tr. 374.

[97] Findings of Fact 47.2(a).

tion, Kirksey did not believe it to be winnable.[98] The *Connor* Court plan increased the BVAP majority. Not surprisingly, Kirksey lives in the district whose BVAP majority he would like to increase. However, Kirksey ran for the Senate from the district as configured by the legislature in the 1979 elections.[99] He proved himself wrong by winning the election. The court below held that "there is no evidence that this change [Kirksey's proposal] was ever called to the attention of the Committee prior to the enactment of the statutory plan. In any event, the change sought merely increases the black population in an already 60 percent black majority BVAP district, a change of dubious benefit to black representation." [100] That finding remains valid, in view of the fact that not only Appellant Kirksey, but also another black, Representative Douglas Anderson, were elected to the Senate from Hinds County.

HOLMES, HUMPHREYS, MADISON, YAZOO COUNTIES—SENATE

The Appellants complain that Holmes and Humphreys are not joined together in a Senate district.[101] The legislature again would have to have been clairvoyant to anticipate this objection. Neither the Department of Justice nor any of the three plans submitted to the *Connor* Court combines Holmes and Humphreys Counties into one district. The record does not reflect any evidence that this combination of counties was

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[98] Kirksey, Tr. 874.

[99] Findings of Fact 47.1(a), n. 3.

[100] *Id.*, 47.2(a).

[101] Kirksey, Tr. 885-888.

called to the attention of the Committee staff at any time prior to the passage of S.B. 3098.

The percentages surrounding the change and the resulting configurations also make the objection difficult to understand. Set out below are the black population percentages for this area for both the statutory plan and the proposed settlement plan.[102]

Statutory Plan		Settlement Plan	
District	Black Pop.	District	Black Pop.
20	66.33	23	67.11
21	57.38	31	56.03
30	41.01	22	28.87

As this table demonstrates, in order to increase an already 65% black population district by .78%, the Appellants were willing to reduce two other districts by 1.35% and 12.14%, respectively. This is exactly why the experts for the State drew their lines from north-to-south as opposed to the east-to-west alignment urged by the Appellants. In order to gain enough population to accommodate an entire district, Appellants were forced to borrow white population from neighboring white majority population counties. In so doing, the impact of the black population in these districts was lessened far beyond the meager benefit gained in the combination of Holmes and Humphreys.

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[102] These districts account for all counties in question in this area; namely, Holmes, Humphreys, Madison and Yazoo. The difference in district numbers is due to a numbering system in the settlement plan that is different from that in the statutory plan. Finally, we emphasize that the percentages are "Black Population" and not "Back Voting Age Population (BVAP)."

Even more astounding is the fact that the change in the proposed settlement plan results in the *loss* of a 60% BVAP district. District 20 in the statutory plan has a BVAP of 60.37%. District 23 in the proposed settlement plan has a BVAP of 59.86%. This result makes the change even more difficult to understand, especially when the alleged rationale behind it is to remedy perceived dilution in the area.

As the Court below noted, "the record does not reflect any evidence that the requested combination of these counties into a single district was called to the attention of the Committee staff at any time prior to the passage of the statutory plans." [103] The Court also observed, as we have noted, that "the settlement plan would split Madison County across the middle and would dilute the vote in Yazoo County and in north Madison." [104]

Finally, Appellants make much of the fact that Mississippi's first black legislator, Representative Robert Clark, was elected from a district comprised of Holmes and Humphreys Counties. We note that Representative Clark not only voted for the statutory plan, but also sought modifications to the Holmes Senate district which were incorporated in the final Senate bill.[105]

WASHINGTON, ISSAQUENA, SHARKEY COUNTIES—SENATE

Appellants urge this Court to find that black voting strength has been fragmented and cancelled out in the Washington, Issaquena and Sharkey districts config-

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[103] Findings of Fact 27.2(b).

[104] *Id.*

[105] Fortenberry, Tr. 478-479.

ured by the State's statutory plan because (1) the black vote is split between two long narrow districts; and (2) the BVAP in District 23 is too low to allow black voters representation of their choice.

Appellants' own expert, Henderson, testified:

> I think where there are any districts that might look suspect from the grounds of shape, it's probably because of characteristics of the population. Like, *Issaquena,* that's a county with an *enormous land area* and a very *small number of people* living there, and any county that anybody carves out any time that includes *Issaquena* in it may very well have a *strange shape* because there are some other counties around there, *like Sharkey* that *also have odd-looking shapes and are not densely populated. So almost any district that comes into that particular area looks suspicious.* [*Connor* Tr. 105; emphasis added] [This testimony of Henderson's before the *Connor* Court was made part of the record in the case below.]

More importantly, the BVAP as it now stands in the statutory plan (55.74%) would be increased only a mere 1.42% by the settlement plan, yielding a BVAP of 57.16%, a percentage less than the 60% figure that Appellants claim is needed to allow black voters to elect candidates of their choice.

The districts about which they now complain are the same as those contained in the legislative proposal in existence prior to the public hearings. No objection prior to the enactment of the statutory plan was ever voiced on the configurations of these districts. If the settlement plan were allowed to prevail, the adjacent district would become "equally as long and twice as wide." [106]

[106] Fortenberry, Tr. 527.

The Court below, upon taking into consideration all of the Appellants' objections to the State's configuration in this area, found that "the changes in the settlement plan are not significantly different from those created by the statutory plan or ameliorative of the problem of forming compact districts in this area." [107]

At the time of negotiating the settlement plan five months after the legislature had acted, Appellants had the statutory plan before them as a known starting point from which they then devised desired changes. It is important to note that none of the particular districts Appellants complain of now were brought directly to the Committee with a request to include them in the statutory plan or to the drafters of the statutory plan at the time the statutory plans was created. Moreover, Appellants apparently decided not to contend with the political process in deciding what should be done in endeavoring to implement their decisions.

The "settlement plan" which ultimately became, in essence, the *Connor* Court's plan is, in fact, nothing more than a fine tuning of the statutory plan in certain limited areas of the State to bring into better focus the political needs of certain blacks who desire to enhance their own political ambitions.[108] It does not, however, result in enhancement of the political position of blacks in the State as a whole.

In light of the evidence, as summarized above, it is clear that, regardless of who had the burden of going forward with proof on the issue of "purpose," the State introduced ample evidence which, if believed, would support the finding of the court below that the

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[107] Findings of Fact 47.2(c).

[108] Findings of Fact 47, n. 3, and 49; Conclusions of Law 20.

State's agents acted with benign purpose and would refute any evidence of Appellants to the contrary. The trial court heard the testimony and had the statistical evidence, demographic data, and maps before it which were introduced by all parties. There is no basis to conclude that the factual findings derived from that evidence were clearly erroneous. The court's judgment should, therefore, be affirmed.

II. THE TRIAL COURT RULED CORRECTLY IN HOLDING THAT THE STATUTORY PLAN WAS NOT RETROGRESSIVE.

Appellants contend that the district court erred in concluding that S.B. 3098 and H.B. 1491 do not have a racially discriminatory effect. They contend that the statutory plan, when compared with the *Connor* settlement plan, is "retrogressive" in its treatment of black political power and that Section 5 clearance should have been denied. *Beer* v. *United States, supra.* Appellants assert that the district court recognized that the statutory plan was *"retrogressive,"* but held that "slight differences" in the plans were "insignificant" given the preference for legislatively-enacted plans and the broader tolerances which are allowed to legislatures in this area. Continuing, Appellants assert, "This Court has never countenanced the view that there are degrees of retrogression . . . ." [109]

At the outset, we note that the court below *never* recognized the statutory plan as being *retrogressive* when compared with the *Connor* settlement plan. To the contrary, the trial court specifically found that "when compared to the settlement plan adopted by the *Connor* Court on April 13, 1979, the legislative plan is *not*

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[109] Intervenors Jurisdictional Statement at 26.

retrogressive . . . ." [110] The district court did note certain differences between the proposed settlement plan and the statutory plan but determined that these differences were not of such moment as to support a finding that the legislative plan was retrogressive in its treatment of minority voting strength.[111]

One "difference" was that the statutory plan, covering both the Senate and the House, contained three fewer majority BVAP districts than did the court-ordered plan. The court stated that this "difference" of three districts between the settlement plan and the statutory plan involved districts with less than 60% BVAP.[112] The Court then alluded to the fact that the evidence and testimony had demonstrated and "it has been generally conceded" that a district with less than 60% BVAP was not a "winnable" district by blacks and that districts with less than 60% BVAP were simply "influence districts" in which, absent exceptional circumstances, black voters do not have an opportunity to elect a candidate of their choice. The court, in reaching its decision to attach little significance to a difference of three majority BVAP districts below 60%, evidently relied on a concession by the United States during the deposition of the Honorable Drews S. Days, Assistant Attorney General for Civil Rights, to the effect that a difference of three such "influence districts" in a 174-seat legislature does not represent a significant difference under Section 5.[113] More importantly,

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[110] Findings of Fact 49 (emphasis added).

[111] Conclusions of Law 20.

[112] Findings of Fact 36.

[113] *Id.*

the court concluded that both plans, i.e., the statutory plan and the proposed settlement plan, *provided the same number, 16, of BVAP majority districts with a population of 60% or more.* The 60% criteria was advanced by Appellants as the necessary BVAP majority to create a district in which a black could win. The court determined after assessing other criteria, e.g., previous federal court apportionment efforts and demographic distribution of black population in Mississippi, that the statutory plan when compared to the proposed settlement plan was "not retrogressive in overall black voting strength and does not have the effect of abridging or denying the right to vote of any citizen of Mississippi on account of race." [114]

In applying *Beer,* the district court held Mississippi to a higher than necessary standard when it compared the statutory plan with the plan adopted by the *Connor* Court (the Connor settlement plan) on April 13, 1979. We contended below and still contend that the district court should have used the court-ordered *1975* plan for comparison purposes because it was the plan *in existence* at the time the legislature which had been elected under the 1975 plan, drafted the statutory plan. When compared with 1975 plan, the political prospects of blacks are significantly enhanced.[115]

This Court has previously confronted a similar issue. In the *City of Richmond* case, it cited with favor the decision by the Fourth Circuit on a similar settlement agreement, finding that there was no cognizable direct evidence that blacks would have been appreciably bet-

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[114] *Id.*

[115] *Id.*, 44.

ter off under the settlement plan. 422 U.S. at 376, n. 7. Indeed, this Court was foresighted enough to note that the drawing and redrawing of plans through special Masters and compromise negotiations must, sooner than later, come to an end, else the litigatory process would go on indefinitely. Addressing itself to that issue in *Gaffney* v. *Cummings,* the Court overtly wondered:

> What is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally "better" when measured against a rigid and unyielding population-equality standard. 412 U.S. 735, 750 (1973).

Indeed, it is perfectly obvious that the endless litigation that the Court admonishes against would be all the more prolonged if more allegedly precise plans could be promulgated, produced, and offered in evidence *ex post facto* of the plan *sub judice.* Indeed, as Mr. Justice Douglas and his dissenting brethren noted in *Whitcomb* v. *Chavis,* "One can always fault a lower court by stating theoretical aspects of apportionment plans that may not have been considered." 403 U.S. at 180 (Douglas, Brennan, and Marshall, J.J., concurring). Thus the statistical line must be drawn in a timely fashion and not under a theory of *nunc pro tunc* as Appellants urge.

The present legislature was elected under the *1975 Connor* Court-ordered plan and it was this plan which we contended and still contend established the "voting strength of blacks" from which there can be no retro-

gression per *Beer*. The statutory plan, when measured against this *1975* court-ordered plan, substantially "enhances potential black voting strength." [116] The November, 1979, legislative elections provide the ultimate proof of the validity of that finding. True, the court below rejected our contention in this regard. It accepted the arguments of the Appellants and compared the statutory plan with the *Connor* settlement plan *which was not even in existence when the legislature* acted and *still found no retrogression.*

In addition to misconstruing the trial court's finding that there was no retrogression, Appellants also quibble with the way in which it was reached. They contend that in making its comparison, insufficient consideration was given by the court to socio-economic considerations, population shifts since the 1970 Census, the shape or compactness of districts and that too much consideration was given to the so-called "65% (60%) Rule." We deal with all of these concerns in Part III, *infra.* Suffice it to say in conclusion here, however, that the Court below simply did not find *de minimus* retrogression. It resoundingly and affirmatively concluded that there was *no* retrogression, and thus no prohibited Section 5 "effect" per *Beer.*

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[116] *Id.*, 44.

III. THE DISTRICT COURT DID NOT COMMIT ERROR WITH REGARD TO THE WEIGHT IT ACCORDED EVIDENCE CONCERNING 1970 CENSUS DATA, POLITICAL ACTIVISM OF RURAL VERSUS URBAN BLACKS, AND THE SHAPES OF DISTRICTS, AND APPELLANTS ARE ESTOPPED FROM COMPLAINING ABOUT THE TRIAL COURT'S ADHERENCE TO THE 60% RULE.

The final issue before this Court is whether or not the court below properly took into account certain factors which the Appellants contend make the minimal and apparently insignificant differences in the plans compared by the district court of sufficient significance to constitute retrogression insofar as black voting strength is concerned. Appellants contend that the trial court erred in (a) the failure to allow for population shifts since the 1970 census; (b) the denigration of differences between the statutory and settlement plans that do not result in additional 60% BVAP districts; (c) the failure to consider differences between the political activism of urban and rural blacks; and (d) the failure to find invidiousness from odd-shaped districts.

Appellee contends that the differences between the plans are so unsubstantial that to focus upon these factors in the few areas where the plans are different is to fail to view and compare the plans as a whole. Indeed, "where the only claim is based on disparate effect, then piecemeal review of an apportionment plan may well be misleading." *Connor* v. *Finch,* 431 U.S. at 428 (Blackmun, J., and Burger, C.J., concurring). *See also Washington* v. *Davis,* 426 U.S. at 239, 242, 243, 246; *Richmond* v. *United States,* 422 U.S. at 370-371; and *Gaffney* v. *Cummings,* 412 U.S. at 749.

We referred to those isolated areas of the State where the plans are different in our discussion on "purpose" because of possible relevance on the issue of intent and state of mind. On the issue of "effect," however, we contend that it is inappropriate to look at only pieces of a 174-seat whole. The district court properly "viewing the State as a whole," found that the statutory plan "reflects the geographic distribution of black population within the State." [117] The failure to realize or implement every possible change to the resulting configuration which might enhance a minority's *hypothetical* voting strength does not constitute a dilution of its electoral power within the meaning of Section 5. *Georgia* v. *United States,* 411 U.S. at 535, n. 7. The law does not mandate a system of proportional representation. *Whitcomb* v. *Chavis, supra.*

There simply is no duty to affirmatively gerrymander. A minority is not constitutionally entitled to an apportionment structure designed to *maximize* its political advantage. *Gilbert* v. *Sterrett,* 509 F.2d 1389, 1394 (5th Cir. 1975). In *Richmond,* a claim was made that an annexation which reduced black voting strength from 52% to 42% diluted that strength. There, as a precursor to the rule later laid down in *Beer,* the Court refused to ascribe the statutory meaning of "effect" to the claim of dilution within the circumstances of that case. *Richmond* v. *United States,* 422 U.S. at 372. The converse ruling, this Court reasoned, would impose an obligation on federal courts to guarantee maximum black voting strength regardless of other valid and nondiscriminatory political considerations. Neither the history of the Voting Rights Act nor that of the State

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[117] *Id.,* 40.

of Mississippi warrants such a drastic interpretation of Section 5.[118]

We address ourselves here, nonetheless, to the factors which the Appellants contend the court below failed to appropriately consider when comparing the two negligibly different plans:

(1) *Use of 1970 Census Data.* Appellants contend that the State used 1970 census statistics which they allege "were hopelessly out-of-date and which did not reflect current voting realities." [119] This Court, and by its example other federal courts, has not labored over the efficacy of this national standard. When we were here before, the Court noted that it was "not unusual in cases such as this" for census data to be in dispute. *Connor* v. *Finch,* 431 U.S. at 416, n. 13. Yet in that case both the Court, *id.*, and the concurring Justices, *id.* at 423-424, utilized the very census data of which Appellants here complain. *See also Kirkpatrick* v. *Preisler,* 394 U.S. 526, 528 (1969) and *Gaffney* v. *Cummings,* 412 U.S. at 745, 746 and 754. The State's expert, Dr. Dunn, was uncontradicted in his testimony that 1970 census data was the only known source of uniform data avail-

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[118] Both the Government in its Jurisdictional Statement at 11 and 27, and that of the Intervenors at 2, importune their version of the history of the State. Leaving that argument for another time and place, Appellee merely seeks to confine the Court's attention to the formal record below, importuning on its part the opinion of Mr. Justice Blackmun in a similar case that, "On balance, . . . my judgment is that this is neither the time nor the occasion to be punitive toward Jackson [, Mississippi] for its past constitutional sins of segregation." *Palmer* v. *Thompson,* 403 U.S. at 230 (concurring opinion).

[119] Intervenors Jurisdictional Statement at 4.

able for the entire state.[120] The court below did not commit error in permitting the legislature to rely exclusively on the accuracy of that uniform body of data.

(2) *Use of the 65% Rule in Defining Black Districts.* The court below found that the figure deemed to constitute a "winnable" black district was 65% black population (BPOP) or 60% black voting age population (BVAP). These figures have been cited with some approval by this Court, in what has come to be known as "the 65% Rule." *United Jewish Organizations* v. *Carey,* 430 U.S. at 169 (Brennan, J., concurring). While the origin of this figure in *United Jewish Organizations* is unclear,[121] there was statistical evidence introduced in the court below by the Appellants, over the State's objection, in support of such a rule in this case. The State's objection notwithstanding, the trial court accepted the evidence and applied it as a yardstick in comparing the two plans before it. When using this rule for comparison purposes, the plans compute

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[120] Tr. 547-549; Findings of Fact 15.

[121] Mississippi at no time during or since the trial below conceded the validity of the universal application of this figure, especially given this Court's rulings on the respective uniqueness of reapportionment on a State-by-State basis. *See Reynolds* v. *Sims,* 377 U.S. 533, 578 (1964); *Kirkpatrick* v. *Priesler,* 394 U.S. at 530; *Mahan* v. *Howell,* 410 U.S. 315, 328 (1973). The only documentation for the 65% figure in *United Jewish Organizations* seems to be that of an unnamed Department of Justice spokesman to "[a] staff member of the Legislative Reapportionment Committee [who] testified that in the course of meetings and telephone conversations with Justice Department officials, he 'got the feeling . . . that 65 percent would be probably an approved figure' for the non-white population in the assembly district[s]" which were in the process of formulation. *United Jewish Organizations* v. *Carey,* 430 U.S. at 152.

to be identical in the number of "winnable" black legislative seats, i.e., 16. Further, application of the "Rule" has the effect of rendering a negligible difference (39 as opposed to 36 or a difference of 1.7% for the 174-seat legislature) in BVAP majority districts in the 50%-59% range particularly insignificant since, according to the "Rule," blacks could not reasonably expect to elect a black candidate in such districts.[122]

Mississippi has always had concern about any BVAP percentage, such as 60% or any other (including 50.1%), becoming "magical" insofar as anything above it is "winnable" by blacks and anything below it not. Indeed, the State introduced evidence to show that blacks have been elected to public office in numerous instances in Mississippi where the BVAP was significantly less than 50%.[123] Mississippi cannot say, however, that there was no evidence which would have permitted the court below to adopt the 60% rule as a yardstick in the peculiar circumstances of this case and certainly the Appellants are in no position to complain of the trial court having done so, since they are responsible for having urged the "Rule" upon the trial court below from the outset.[124]

(3) *Urban Versus Rural Blacks.* Appellants emphasize alleged urban-rural divisions in particular counties in the State which allegedly subject erstwhile black majorities to the imagined threat of white bloc voting

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[122] *See* Findings of Fact 49, n. 5.

[123] Bishop Dep., 6-12; Sumner Dep., 6-7; Snyder Dep., 4-8; Poindexter Dep., 13-17; Chew Dep., 6-7.

[124] Loewen, Tr. 1391-1396.

and political apathy and fear among rural blacks in Mississippi.[125] They contend the trial court improperly gave the same weight to a 60% BVAP district comprised of urban and rural blacks as to one of solely urban blacks. This Court has confronted this issue and has found that while such "so-called urban-rural division has been much talked about," any such "[a]ntagonistic bloc voting by the two camps may occur, but it has been overemphasized." *Whitcomb* v. *Chavis,* 403 U.S. at 148, n. 27.

To whatever extent bloc voting may exist on either side of the racial or political line, or to the extent that urban blacks are more politically active than their rural counterparts, it is clear that this Court has never found it to be unconstitutional for a legislature to fail to take these factors into consideration. *Id.* at 155.

(4) *Odd-shaped Districts.* Appellants distort the record in their contention that the statutory plan significantly departs from neutral guidelines and results in excessively odd-shaped districts to the disadvantage of black candidates. As with the concept of "purpose," there was no *a priori* intent by the legislature to create a "systematic and intentional partisan gerrymander," *Wells* v. *Rockefeller,* 394 U.S. 542, 544 (1969), nor is the statutory plan a concatenation of derelict districts resulting in "an unconstitutional 'crazy quilt.'" *Kilgarlin* v. *Hill,* 386 U.S. 120, 121 (1967).

Some of the districts are concededly not aesthetic or purely geometrical. These lines were drawn by rational experts who were endeavoring to balance populations

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[125] Government Jurisdictional Statement at 16, n. 5 and Intervenors Jurisdictional Statement at 16-20.

and realities, such as natural or commonly understood geographic boundaries and communities of interest. *See Gaffney* v. *Cummings,* 412 U.S. at 752, n. 18. To attempt to apply a universally rigid standard of compactness in such a case is to pursue a "will-o'-the-wisp." *Kirkpatrick* v. *Preisler,* 394 U.S. at 538 (Fortas, J., concurring).[126]

The record shows that Appellants do not in fact object to irregularly-shaped districts when they work to their advantage, since they themselves created such districts in order to obtain black percentages acceptable to them. None of the districts in question—and there are only seven sets of them in the House plan—is so highly irregular as to call them into quetsion on account of their shape. Intervenors use hyperbole in describing districts to which they object, but totally failed to submit appropriate proof to counter the testimony of the State's experts that the districts were drawn by using, and indeed were dictated by neutral apportionment techniques. In the cases of both LeFlore and Marshall Counties, for example, the settlement plan districts were less regularly shaped at Intervenors' insistence to achieve their desired racial mix. The Court below considered the Appellants' allegations concerning odd-shaped districts, e.g., Finding of Fact No. 47(c), and found them devoid of merit. *See also White*

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[126] The Court has been much more realistic in this regard, observing, "Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those [plans] made by reapportionment plaintiffs who may have wholy different goals from those embodied in the official plan." *Gaffney* v. *Cummings,* 412 U.S. at 749.

v. *Regester,* 412 U.S. at 764, n. 8. The District Court found that policy of compactness reasonable and it should be affirmed.

IV. THE FINDING OF THE DISTRICT COURT IS NOT REVERSIBLE UNDER THE "CLEARLY ERRONEOUS" STANDARD.

As the foregoing discussion and the record below clearly indicate, the State of Mississippi has successfully borne its Section 5 burden down the long and arduous road to declaratory judgment in Washington, D.C. This burden has been successfully carried despite the changed circumstances since the Court's initial views regarding the efficacy of this judicial alternative.[127] This achievement was both massive and expen-

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[127] In the earlier days of this kind of litigation, this Court was able with confidence to state simply that "the area affected can always go into court," *South Carolina* v. *Katzenbach,* 383 U.S. at 333, and later found that "[i]f a State finds the Attorney General's delays unreasonable . . . the State 'may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.' *Allen* v. *State Board of Elections,* 393 U.S. [544,] 549 [(1969)] . . . ." *Georgia* v. *United States,* 411 U.S. at 541, n. 13. At that time, this Court was able to make such benign recommendations in view of the number of plans failing to receive pre-clearance in the Voting Rights Section of the Department of Justice. During that period, rejections by the Attorney General's office of state and local voting changes numbered only one in about 250. *See Allen* v. *State Board of Elections,* 393 U.S. at 549, n. 5 and 556, n. 22. Since then, of course, either the standards of the Voting Rights Section or the stringency of their interpretation has increased geometrically. Cf. the *amicus* brief of the State of Mississippi in *City of Rome, et al.* v. *United States, et al.,* No. 78-1840 at 14-25, indicating that at the current rate of objection, about 180 plans a year are being rescinded. This trend has the dual effects of increasing the burden on smaller jurisdictions and of clogging the federal court system.

sive and earned the unanimous approbation of the statutory three-judge Federal District Court below.[128]

When all was said and done at the trial, the sole determinations to be made in this case were those of fact. "As we have often indicated, questions of constitutional power frequently turn in the last analysis on questions of fact." *Oregon* v. *Mitchell,* 400 U.S. at 247 (Douglas, J., dissenting). Here the well-respected rule on findings by the trial court falls into place: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." FED. R. CIV. P. 52(a). This "hornbook law . . . [of] deference," *Washington* v. *Davis,* 426 U.S. at 260 (Brennan and Marshall, J.J., dissenting), is directly applicable to the facts and to the absence of reversible error in this case.[129] The record in the present cause is

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[128] Similarly, whereas this Court could once simply acknowledge the fact that "[r]equiring that declaratory judgment actions be brought in the District of Columbia places a burden on the plaintiff," *Allen* v. *State Board of Elections,* 393 U.S. at 559, it is likewise no longer equitable simply to seek to balance that burden with the *nudum dictum* that "the State has sufficient resources to prosecute the actions easily in the Nation's Capital." *Id.*

[129] Cf. the dissents of Justices Brennan, Douglas and Marshall in *Richmond* v. *United States,* 422 U.S. at 385 and the dissenting opinion of the same three Justices in *Mahan* v. *Howell,* 410 U.S. at 345, on this same point. Thus, "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any stated facts reasonably may be conceived to justify it." *Metropolitan Casualty Insurance Company of New York* v. *Brownell,* 294 U.S. 580, 584 (1934). Likewise, "[c]ourts . . . will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.'" *Oregon* v. *Mitchell,* 400 U.S. at 248 (Douglas, J., dissenting) (citations omitted).

similar to that in *Wright* v. *Rockefeller,* where the Court held that, "It is plain to us that the District Court was not compelled to find that these districts were the product of a State contrivance to discriminate against colored . . . voters." 376 U.S. at 57. Thus the Court has ample grounds to repeat its conclusion in *Washington* v. *Davis,* that "[t]he District Court's judgment was warranted by the record before it, and we perceive no good reason to reopen it . . . ." 426 U.S. at 252.[130] As Mr. Justice Douglas observed, "One can always fault the lower court by stating theoretical aspects of apportionment plans that may not have been considered [in the proceedings below]." *Whitcomb* v. *Chavis,* 403 U.S. at 181 (concurring in part and dissenting in part).

This Court has spoken of the "endless litigation," *Whitcomb* v. *Chavis,* 403 U.S. at 156, engendered by State reapportionment cases, and has referred to this litigation *sub nom.* in particular as a "painfully protracted process" which "has occupied the attention of the federal courts for 12 years." *Connor* v. *Finch,* 431 U.S. at 410. With the decision by the District Court below, that long process has come to a statutory and constitutional end and "the citizens of Mississippi at long last . . . [have] elect[ed] a legislature that properly represents them [all]." *Id.* at 426.

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[130] Even were it otherwise, reversal or remand should be based on "record facts, not suppositions," *United Jewish Organizations* v. *Carey,* 430 U.S. at 183 (Burger, C.J., dissenting), rather than "relying on conjecture . . . . [and] [s]peculations," *Burns* v. *Richardson,* 384 U.S. at 87, as Appellants do here.

CONCLUSION

Therefore the final judgment and decree of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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November 26, 1979

APPENDIX

APPENDIX

MISSISSIPPI
HOUSE OF REPRESENTATIVES

P.O. Box 1018 JACKSON 39205

November 16, 1979

Received: November 19, 1979.

Honorable Jerris Leonard
Leonard, Cohen, Gettings and Sher
Suite 550
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Leonard:

Enclosed is the updated survey of legislative races by candidates in districts which contain 40% or more black voting age population. This revised version of the survey is based on the results of the recent November 6 General Election.

Your attention to this matter will be appreciated.

Sincerely,

/s/ DOUG WEAVER
Douglas M. Weaver
Legislative Counsel
and Draftsman

DMW/sg
enclosure

cc: Honorable T. H. Campbell, III

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
		Henry Boyd, Jr.	B			
5	56.02	Ralph Doxey	W	N		E
		Leroy Jones (I)	B			
6	41.87	Gene Manning	W	N		E
9	63.48	Sonny Tedford	W			
		Jack Tucker	W			
		Clayton Henderson	B		N	E
10	41.74	Harry Bryan	W	N		E
11	46.47	Wes McIngvale	W	N		E
		F. R. "Larry" Martel	W			
26	68.83	Aaron E. Henry	B	N		E
27	46.02	Kenneth Williams	W	N		E
28	62.16	Ed Jackson	W	N		E
		Robert B. Morris (I)	B			
		Mabel W. Anderson (I)	B			
29	40.75	Charlie Capps	W	N		E
30	62.00	Hilliard Lawler	W	N		E
		Kenneth Thomas (I)	B			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
31	54.21	Guy Williams	W	N		E
32	55.75	Will Green Poindexter	W	N		E
		Pete Wood (I)	W			
		Ray Edward Dodd (I)	W			
33	51.47	Jack G. Flautt	W			
		Paul Pennington	W			
		Thomas U. Reynolds	W	N		E
34	64.26	Bunky Huggins	W	N		E
		David Jordan	B			
		Silas McGehee, Jr. (I)	B			
36	50.54	Clarence Pierce	W	N		E
		Robert L. Ball	W			
38	43.75	Lee Coleman	W	N		E
		Jimmy Clark	W			
		Claude Watkins	W			
40	63.68	Stanley Gray	W			
		Tyrone Ellis	B	N		E
		G. Jolly (R)	W	N		E
42	40.10	Thomas McCrary	W	N		E

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
49	59.49	Robert Clark	B	N		E
50	60.23	David Halbrook	W	N		E
		L. Richard Berryhill	W			
		Abraham Gates	B			
51	68.35	Leslie King	B	N		E
		Bessie Given	B			
		Jack L. Taylor (I)	W			
53	55.63	Nick Crawford (R)	W	N		
		Perrin Grisson	W	N		E
		Josh Bogen	W			
		Kathy Starr (I)	W			
54	40.14	H. L. (Sonny) Merideth	W	N		E
55	48.23	C.B. (Buddie) Newman	W	N		E
		Johnny Brewer (I)	W			
56	47.10	Ed Buelow	W	N		E
		Mary Frances Terry (R)	W	N		
		Perry Dillard (I)	B			
58	44.95	T. H. Campbell III	W	N		E

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
59	59.93	Edward Blackmon	B			
		Hermit Jones	W	N		E
		George Nichols (I)	B			
60	52.57	P. L. Hughes	W			
		Donald S. Alford	W	N		E
		Jerry Lee Ainsworth (I)	W			
		David Richardson (I)	W			
		Don Lane (I)	W			
67	70.25	Hillman Frazier	B	runoff	N	E
		Hickman Johnson	B	runoff		
		Bob Woodson	B			
		Nehemiah Flowers, Jr. (R)	B	N		
68	74.53	Jerry Brumfield	B			
		Credell Calhoun	B	N		E
		Frank E. Dennis	W			
		Emma Sanders	B			
		John Rawls (R)	B	N		
		Emmett Nichols, Jr. (I)	B			
		Jody B. Hasten (I)	B			
69	69.70	Fred Banks	B	N		E
		James Meredith	B			
		James R. Johnson (R)	B	N		
		Edward C. Eckman (I)	B			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
70	68.78	Horace Buckley	B	N		E
		George Barnes	B			
		Lula Lee Grisham (I)	B			
77	44.18	R. E. Anderson	W	N		E
		Lewis Weese	W			
84	51.41	Charles L. Young	B	N		E
		Rick Fortenberry	W			
87	71.55	Dr. Charles Sheppard	B	N		E
		Jimmy Smith	W			
		Jessie A. Morris (I)	B			
		Roosevelt Yarbrough (I)	B			
95	60.63	Barney Schoby	B	N		E
		Mrs. V. L. Holmes (R)	B	N		
98	57.07	Homer Smith	W			
		David Green	B	N		E
104	52.28	Percy Watson	B	N		E
		Mike McMahan	W			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI SENATE

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
2	48.39	David Fly	W			
		Phil Franks	W			
		Frank W. Houck, Sr.	W			
		William Minor	W	runoff	N	E
		George M. Yarbrough	W	runoff		
		Lucius Edwards (I)	W			
10	46.34	Charles Ray Nix	W	N		E
11	59.17	James E. Molpus	W	N		
		Malcolm Mabry (R)	W	N		E
12	51.04	William B. Alexander	W	N		E
		Thomas Morris (I)	B			
13	56.79	Robert L. Crook	W	N		E
		David Matthews	B			
		O. B. Bennett (R)	W	N		
14	51.29	John J. Fraiser, Jr.	W	N		E
15	44.24	Charles Pittman	W	N		E
		Donald Strider	W			
20	60.37	Bob Montgomery	W	N		E
		Arthur J. Tate (I)	B			
21	51.15	Herman B. DeCell	W	runoff		
		Ollie Mohammed	W	runoff	N	E
		Rufus (Pete) Straughter	B			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI SENATE

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
22	44.48	Howard Dyer	W	N		E
23	55.74	J. K. (Buddy) Gresham	W	N		E
		Charles V. McTeer	B			
27	59.84	Douglas Anderson	B	N		E
		M. R. Jennings	B			
		Patricia King (I)	B			
28	62.93	Henry Kirksey	B	runoff	N	E
		H. M. Thompson	B			
		James E. Walters	W	runoff		
		Joe R. Dunbar (I)	W			
		R. L. Humphrey (I)	W			
32	49.27	Allen D. Burton	W			
		Algie Davis	W	runoff	N	E
		Worth Hal Thomas, Sr.	B	runoff		
		Arnold Flowers (I)	W			
37	57.39	Jay Disharoon	W	N		E
		Charles Evers (I)	B			
38	48.28	Robert M. Dearing	W	N		E
		Donald Shupe	W			
		Joe Ming (R)	W	N		

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

r.g.